No. 15599

In the
United States Court of Appeals
For the Ninth Circuit

ELMER F. SHEPARD and KATHRYN M. SHEPARD, his wife,
Appellants,

vs.

CAL-NINE FARMS, a corporation,
Appellee.

Opening Brief of Appellants

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TOPICAL INDEX

Page

TABLE OF CASES AND AUTHORITIES CITED

Cases

Authority

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STATEMENT RELATIVE TO JURISDICTION

The original jurisdiction of the District Court was invoked by appellee, plaintiff below, by reason of the diversity of citizenship of the parties. Appellants, defendants below, are citizens and residents of Arizona. Appellee, plaintiff below, is a corporation organized and existing under the laws of the State of California, and is a citizen of California. The amount in controversy in this case exceeds $3,000.00, exclusive of interest and costs. The District Court assumed jurisdiction of the case under Section 1332 of Title 28, U.S.C. The Court of Appeals has jurisdiction to review the judgment of the District Court under Section 1291 of Title 28, U.S.C.

STATEMENT OF THE CASE

Appellee, plaintiff below, sued defendants, alleging fraud in the sale of certain farm land in the Harquahala Valley near the west end of Maricopa County, Arizona. The contract was evidenced by an option agreement, plaintiff's Exhibit A (Tr., p. 9), and the escrow instructions, plaintiff's Exhibit 2 (Tr., p. 23), admitted in Evidence. The purchase price was $80,000.00, with an earnest money payment of $2,000.00 and a later payment of $18,000.00 upon the matter going into escrow. The balance of $60,-000.00 was to be payable over a period of years.

Cal-Nine Farms is a California corporation that was not in existence at the time of the alleged fraud it complains of. The corporation was formed after an option agreement had been signed by the appellants and one Ernest Otto and one Henry Haas, representing a syndicate of nine purchasers. On the first day of the trial Cal-Nine Farms, the plaintiff, hereinafter referred to as "plaintiff" or by name, filed an amended complaint, alleging that Otto and Haas entered into the option agreement with the defendant Elmer Shepard wth the intent on the part of said Otto and Haas to have the option exercised by a corporation they intended to form (Tr., p. 95). Otto and Haas also executed a purported assignment of their rights to bring an action for fraud to the plaintiff corporation, again on the first day of the trial (Tr., pp. 278-279; also, Tr., pp. 154-155). Plaintiff also re-alleged in the amended complaint the allegations of fraud that were originally set forth in the original complaint. The complaint alleged that by reason of the fraudulent misrepresentations of the defendant Elmer F. Shepard, the plaintiff corporation was induced to purchase the Shepard farm and in so doing was damaged in the sum of $45,525.00 actual damages and

$20,000.00 punitive and exemplary damages. The defendants denied these allegations of fraud and denied that the plaintiff corporation brought the action as assignee of the nine investors or in its own right (Tr., pp. 80-81). It is the contention of the appellants, defendants below, and hereinafter referred to by name or as "defendants", that the plaintiff corporation had no right of action against the defendants for alleged fraudulent misrepresentations made to individuals before the corporation was formed, and was not a bona fide assignee of any right to such an action.

There is no dispute between the parties that the conversations complained of by the plaintiff all occurred prior to the time the corporartion was formed (Tr., pp. 272-273). Defendants, in addition to denying any fraudulent misrepresentations and denying plaintiff's right to appear in the action as a party plaintiff, also denied that plaintiff had proved its damages, and contended that plaintiff failed to show the proper measure of damages and that the court, therefore, could not make an award of damages on behalf of the plaintiff.

The issues presented by the appeal are:

I. Is the plaintiff a proper party in an action for fraud, when the alleged fraudulent misrepresentations are made to individuals before the plaintiff corporation is formed?

II. If the plaintiff is a proper party plaintiff, has it sustained the burden of proof necessary in a case of fraud?

III. If plaintiff has sustained the necessary burden of proof, has the proper measure of damages been applied?

These points were all raised in the District Court by the defendants upon motions and objections.

SPECIFICATIONS OF ERROR

1. The District Court erred in making its Finding of Fact No. II, which reads:

> "On or about November 17, 1954, defendant Elmer F. Shepard made certain representations to one Ernest Otto and one Henry Haas regarding the condition of a well on the land described in Finding III which was owned by Shepard. At the time these representations were made, it was contemplated by Otto and Haas and certain other residents of California to form plaintiff corporation in order to purchase the land in question from defendant Shepard. These facts were known to Shepard."

for the reason that there is no evidence that the defendant Elmer F. Shepard made representations regarding the condition of the well on the land which he owned. The evidence in the record clearly shows that Shepard voiced only an opinion as to the output of water from the well and an opinion as to the condition of the pump and machinery. There is no evidence in the record that Shepard at this time, to-wit, November 17th, 1954, had any knowledge that Otto and Haas and certain other residents of California intended to form a corporation to purchase his land.

2. The District Court erred in making its Finding of Fact No. IV, which reads:

> "The specific representations made by Shepard at that time and place were as follows:
>
> "(a) That it was Shepard's opinion that the well on the land would pump twenty-two hundred gallons of water per minte.

"(b) That the pump had been pulled from the well on only two occasions; once due to a mistake on the part of the pump company, and once for the purpose of deepening the well.

"(c) That the well was in good condition.

"(d) That the well would run seventy-five two-inch siphon tubes for the purpose of irrigation."

for the reason that the court made the erroneous assumption that an opinion is the same as a representation of fact, and there is no evidence to support such purported finding, and the evidence in the record is contrary to such finding.

3. The District Court erred in making its Finding of Fact No. VI, which reads:

"Otto inspected the pump and well at the time of this conversation, but was prevented from learning the true condition of the well by virtue of the fact that the spout of the well had an elbow in it and a baffle had been welded into the elbow. The combined effect of the baffle and elbow gave an appearance of a considerably more flow of water from the spout than was actually the case."

for the reason that there is no evidence to support such purported finding, and all of the evidence in the record is contrary to such finding.

4. The District Court erred in making its Finding of Fact No. VII, which reads:

"Otto was an experienced California cotton farmer, but had had no acquaintance with deep water wells of the kind used in Arizona."

for the reason that there is no evidence to support such purported finding, and all of the evidence in the record is contrary to such finding.

5. The District Court erred in making its Finding of Fact No. IX, which reads:

> "Each of the representations described in Finding IV were false in the following regard:
>
> "(a) The pump at the time the representation was made, and for several months previous thereto had been incapable of pumping more than fifteen hundred gallons per minute. Shepard was aware of this and did not believe the pump would put out twenty-two hundred gallons per minute.
>
> "(b) The pump had actually been pulled four times in less than two years, and Shepard has spent over Twelve Thousand Dollars ($12,000.00) in an effort to salvage what the man who drilled it described as a 'bad well from the day it was drilled'.
>
> "(c) The casing in the well was broken or collapsed at a point somewhere between four hundred feet and five hundred feet down.
>
> "(d) The well would not at the time of the conversation, nor for a period of several months before, run more than sixty two-inch tubes for the purpose of irrigation."

for the reason that there is no evidence to support such purported finding, and all of the evidence in the record is contrary to such finding.

6. The District Court erred in making its Finding of Fact No. X, which reads:

> "Defendant Elmer Shepard knew that each of these representations were false."

for the reason that there is no evidence to support such purported finding, and all of the evidence in the record is contrary to such finding.

7. The District Court erred in making its Finding of Fact No. XI, which reads:

> "Defendant Elmer Shepard intended that these representations be acted upon by Otto and Haas, and by plaintiff which he knew at that time Otto and Haas contemplated forming."

for the reason that there is no evidence to support such purported finding, and all of the evidence in the record is contrary to such finding.

8. The District Court erred in making its Finding of Fact No. XII, which reads:

> "Each of these representations was material to the transaction involved, since the presence or absence of water on the desert land in this area is the principal factor in fixing the value of the land."

for the reason that it is based on the erroneous assumption that Shepard made material representations to Otto and Haas, and all of the evidence in the record is contrary to such finding and assumption.

9. The District Court erred in making its Finding of Fact No. XIII, which reads:

> "Neither Otto nor Haas, nor any other agent of the plaintiff at any time prior to the execution of the agreement described below knew of the falsity of these representations."

for the reason that said finding is based on the erroneous assumption that Shepard made false representations to

Otto and Haas, and all of the evidence in the record is contrary to such assumption and to such finding.

10. The District Court erred in making its Finding of Fact No. XIV, which reads:

> "Otto and Haas, in reliance on the truth of these representations, and in contemplation of forming a corporation to exercise the option, entered into an option agreement on November 17, 1954, with defendants Elmer and Kathryn Shepard whereby they obtained an option to purchase the land in question for the sum of Two Thousand Dollars ($2,000.00)."

for the reason that said finding is based on the erroneous assumption that Otto and Haas relied on representations of Shepard, and for the reason that there is no evidence to support such purported finding and all of the evidence in the record is contrary to such finding.

11. The District Court erred in making its Finding of Fact No. XVI, which reads:

> "Plaintiff, by its agent Otto, went into possession of the land in March, 1955, and immediately commenced irrigating in preparation for a cotton crop. When firsrt turned on, the pump in the well in question produced less than fifteen hundred gallons of water per minute, and thereafter its output constantly declined throughout the summer so that by September, 1955, it produced only two hundred and fifty gallons per minute. Otto, on behalf of plaintiff, sought and followed the advice of an expert well driller as to how best to conserve the well. In October, 1955, it was necessary to completely replace the well and drill a new one. Plaintiff expended the sum of Twenty-two Thousand Six Hundred Six and 40/100 Dollars ($22,606.40) in drilling and equipping a new well. The expenditure of this sum was reasonably necessary to produce a well approximately equivalent in

> cost to that represented by Shepard as being on the property at the time of sale."

for the reason that such finding erroneously assumes that the cost of the replacement of a well is the proper measure of damages in a case based on fraud in a sale of land, when the Arizona rule in such cases is to the contrary, and for the further reason that there is no evidence to support such purported finding and all of the evidence in the record is contrary to such finding.

12. The District Court erred in making its Finding of Fact No. XVII, which reads:

> "Plaintiff's cotton crop was damaged by the lack of water directly resulting from the failure of the well. Plaintiff, by its agent Otto made reasonable efforts to get water elsewhere but was unsuccessful in so doing. The difference in the value at maturity of the crop which would have resulted had the water supply been as represented, and that which actually did result, was Twelve Thousand Five Hundred Dollars ($12,500.00)."

for the reason that it makes the erroneous assumption that the measure of damages for loss of crop in Arizona is the difference in value at maturity of the crop which would have resulted had the water supply on the land been as represented, when the Arizona rule is to the contrary; and for the further reason that there is no evidence to support such purported finding and all of the evidence in the record is contrary to such finding.

13. The District Court erred in making its Finding of Fact No. XVIII, which reads:

> "Plaintiff has brought this action in its own right and as assignee of the rights of Otto and Haas."

for the reason that it is a conclusion of law and not a finding of fact, and for the further reason that there is no evidence to support such purported finding and all of the evidence in the record is contrary to such finding.

14. The District Court erred in making its Conclusion of Law No. 1, which reads:

> "1. This Court has jurisdiction of the parties by reason of diversity of citizenship. 28 O.S.C. 1332."

for the reason that such purported conclusion does not state the law applicable to the factual situation presented by the record, and there is no evidence in the record to support such erroneous conclusion.

15. The District Court erred in making its Conclusion of Law No. 2, which reads:

> "2. By reason of the fraudulent misrepresentation of defendant Elmer Shepard, defendants are liable to plaintiff for damages sustained by plaintiff which were proximately caused by said representations."

for the reason that such purported conclusion does not state the law applicable to the factual situation presented by the record, and there is no evidence in the record to support such erroneous conclusion.

16. The District Court erred in making its Conclusion of Law No. 3, which reads:

> "3. Under Arizona law, the measure of damages for fraudulent misrepresentation is the so-called 'benefit of the bargain' rule, or the difference between the value as represented and the actual value. *Lutfy vs. R. D. Roper & Sons,* 57 Ariz. 495, 115 P. 2d 161. In the situation of this case, a recognized alternative

> measure proceeding on the same theory is the reasonable cost of placing the property received in the condition in which it was represented to be. McCormick on Damages, Section 122, p. 154."

in that the court makes the erroneous assumption that an alternative to the Arizona rule, which is also called the "benefit of the bargain" rule is the "out-of-pocket" rule, which is in direct conflict with the "benefit of the bargain" rule, and for the further reason that it also conflicts with Finding of Fact No. XVII to the point that the factual situation presented by the record does not support such erroneous conclusion.

17. The District Court erred in making its Conclusion of Law No. 4, which reads:

> "4. These damages amount to Thirty-five Thousand One Hundred Six and 40/100 Dollars ($35,-106.40)."

for the reason that such purported conclusion does not state the law applicable to the factual situation presented by the record, and there is no evidence in the record to support such erroneous conclusion.

18. The District Court erred in making its Conclusion of Law No. 5, which reads:

> "5. Plaintiff is entitled to judgment against defendant in the amount of Thirty-Five Thousand One Hundred Six and 40/100 Dollars ($35,106.40)."

for the reason that such purported conclusion does not state the law applicable to the factual situation presented by the record, and there is no evidence in the record to support such erroneous conclusion, and for the further reason that said conclusion is based upon the erroneous

assumption that the Arizona rule, to-wit, the "benefit of the bargain" rule, as the measure of damages need not be followed.

19. The District Court erred in refusing to find as a fact the matter set forth in Defendants' Requested Finding of Fact No. I, which reads:

> "On November 17, 1954, defendants Elmer F. Shepard and Kathryn M. Shepard entered into an option to purchase agreement with Ernest Otto and Henry Haas. The option to purchase concerned certain land located in the State of Arizona, County of Maricopa more particularly described as follows, to-wit:
>
> The North One-Half of Section 21, Township 1 North, Range 9 West, Gila and Salt River Base and Meridian."

for the reason that such requested finding is material and is supported by the uncontradicted evidence on the part of plaintiff and defendants.

20. The District Court erred in refusing to find as a fact the matter set forth in Defendants' Requested Finding of Fact No. II, which reads:

> "That said Otto and Haas had the opportunity to investigate said property and the chattels thereon and did, in fact, investigate the same, and thereafter entered into the option agreement aforesaid."

for the reason that such requested finding is material and is supported by the uncontradicted evidence on the part of the plaintiff and defendants.

21. The District Court erred in refusing to find as a fact the matter set forth in Defendants' Requested Finding of Fact No. III, which reads:

"That said Otto and Haas entered into said option agreement by virtue of their own investigation of the aforesaid real property and not by reason of any representations made to them by the defendants Shepard, or either of them."

for the reason that such requested finding is material and is supported by the uncontradicted evidence on the part of both the plaintiff and defendants.

22. The District Court erred in refusing to find as a fact the matter set forth in Defendants' Requested Finding of Fact No. IV, which reads:

"That the value of the aforesaid real property at the time the option agreement was entered into was in excess of the purchase price paid by the plaintiff, who is the assignee of said Otto and Haas, and plaintiff has not been damaged."

for the reason that such requested finding is material and is supported by the uncontradicted evidence on the part of the plaintiff and the defendants.

23. The District Court erred in refusing to conclude as a matter of law the matter set forth in Defendants' Requested Conclusion of Law No. I, which reads:

"The Court does not have jurisdiction of the matter because plaintiff is not a proper party plaintiff. *Schwartz v. Durham,* 52 Ariz. 256, 80 P. 2d 456"

for the reason that the same is a correct statement of the law applicable to the facts presented by the record.

24. The District Court erred in refusing to conclude as a matter of law the matter set forth in Defendants' Requested Conclusion of Law No. II, which reads:

"The Federal Court is bound to follow the controlling rules of substantive law, as declared by state legislatures or the highest state courts, in all cases based on diversity of citizenship jurisdiction, unless a Federal constitutional or statutory question is involved.

Erie R.R. Co. v. Tompkins, 58 Sup. St. 817, 304 U.S. Ct. 64, 82 L. Ed. 88;

New York Life Insurance Co. v. Rogers, 126 F. 2d 784 (CCA Ariz.)"

for the reason that the same is a correct statement of the law applicable to the facts presented by the record.

25. The District Court erred in refusing to conclude as a matter of law the matter set forth in Defendants' Requested Conclusion of Law No. III, which reads:

"The measure of damages to be applied in this case is the difference between the real value of the property purchased and the value it was represented to be worth.

Lutfy v. R. D. Roper & Sons, 57 Ariz. 495, 115 P. 2d 161;

Wooley v. Locarnini, 18 Ariz. 539, 164 P. 319;

Curry v. Windsor, 22 Ariz. 108, 194 P. 958;

Ren v. Jones, 38 Ariz. 476, 1 P. 2d 110;

Hidalgo v. McCauley, 50 Ariz. 178, 70 P. 2d 443."

for the reason that the same is a correct statement of the law applicable to the facts presented by the record.

26. The District Court erred in refusing to conclude as a matter of law the matter set forth in Defendants' Requested Conclusion of Law No. IV, which read:

"An action for fraud is a personal action, not assignable.

Schwartz v. Durham, 52 Ariz. 256, 80 P. 2d 456."

for the reason that the same is a correct statement of the law applicable to the facts presented by the record.

27. The District Court erred in refusing to conclude as a matter of law the matter set forth in Defendants' Requested Conclusion of Law No. V, which reads:

> "A corporation not in existence at the time of an alleged fraud has no legal right to bring an action for fraud based upon negotiations between a seller and third parties.
>
> *Nearpark Realty Corp. v. City Investing Company,* 112 N.Y. Supp. 2d 816;
> *Fox v. Hirschfield,* 142 N.Y. Supp. 261;
> *Schwartz v. Durham, ID"*

for the reason that the same is a correct statement of the law applicable to the facts presented by the record.

28. The District Court erred in refusing to conclude as a matter of law the matter set forth in Defendants' Requested Conclusion of Law No. VI, which reads:

> "Fraud is never presumed, but must be shown by clear and convincing evidence.
> *Cole v. Town of Miami,* 52 Ariz. 488, 83 P. 2d 797"

for the reason that the same is a correct statement of the law applicable to the facts presented by the record.

29. The District Court erred in refusing to conclude as a matter of law the matter set forth in Defendants' Requested Conclusion of Law No. VII, which reads:

> "Where one makes an independent investigation of real property before purchase and relies on his own investigation rather than representations made to him by the seller, he has no cause of action for fraud.

Carlson v. Brickman, 110 Cal. App. 2d 237, 242 P. 2d 94;
Law v. Sidney, 47 Ariz. 1, 53 P. 2d 64''

for the reason that the same is a correct statement of the law applicable to the facts presented by the record.

30. The District Court erred in rendering judgment in favor of the plaintiff and in denying defendants' motion for a new trial, because all of the evidence in the case, viewed in the light most favorable to the plaintiff, fails to disclose that there was any reliance by Otto and Haas upon any statements of Shepard that caused them to make the purchase of the land in question, and such being the case, plaintiff has failed to meet the necessary proof of fraud as set forth in *Wood v. Ford,* 72 P. 2d 423, 50 Ariz. 356, and has failed to prove all the elements of actionable fraud, to-wit: (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) his intent that it should be acted upon and in the manner reasonably contemplated, (6) the hearer's ignorance of its falsity, (7) his reliance upon its truth, (8) his right to rely thereon, and (9) his consequent and proximate injury.

Stewart v. Phoenix National Bank, 64 P. 2d 101, 49 Ariz. 34;
Sims Printing Co. v. Kerby, 106 P. 2d 197, 56 Ariz. 130.

SUMMARY OF ARGUMENT

The argument on behalf of defendants-appellants will be presented under the following sub-headings:

I. The right of action growing out of fraud is usually a personal right to the extent that it does not pass with an assignment of the thing to which the right relates. (Specifications of Error Nos. 13, 23 and 26.)

II. Cal-Nine Farms, in exercising the rights of Otto and Haas under the Option Agreement dated the 17th day of November, 1954, did not acquire the right to bring an action based on fraud against Elmer F. Shepard and Kathryn M. Shepard. (Specifications of Error Nos. 13 and 23.)

III. The purported assignment, which is plaintiff's Exhibit 8 in Evidence, constituted an attempt to assign a bare action for fraud, and as such, was not assignable in the absence of statutory authorization. (Specifications of Error Nos. 13, 14, 23 and 26.)

IV. A mere right to litigation for fraud is a personal action and prior to judgment the beneficiary's claim for damages is a mere expectancy or inchoate right, not assignable in law or equity under Arizona law, and prosecution by the alleged assignee of an action for fraud is contrary to public policy and savors of maintenance. (Specifications of Error Nos. 13, 14, 23 and 26.)

V. A corporation cannot bring an action for alleged fraud based upon negotiations between a seller and third parties occurring prior to the corporation's legal existence. (Specifications of Error Nos. 27, 13, 14 and 23.)

VI. Fraud is never presumed, but must be shown by clear and convincing evidence. (Specifications of Error Nos. 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 19, 20, 28 and 30.)

VII. Where one has an equal opportunity to make an independent investigation of real property for purchase, it is presumed he relies on his own investigation rather than representations made to him by the seller, and the purchaser cannot say he has been deceived to his injury. (Specifications of Error Nos. 1, 2, 3, 4, 6, 7, 8, 9, 10, 20, 21 and 29.)

VIII. The measure of damages sustained by a purchaser where a purchase of land has been induced by fraud, is, under the Arizona rule, the difference between the real value of the property purchased and the value it was represented to have. (Specifications of Error Nos. 11, 12, 15, 16, 17, 18, 22 and 25.)

IX. The Federal Court is bound to follow the controlling rules of substantive law as declared by state legislatures or the highest state courts in all cases based on diversity of citizenship jurisdiction, unless a federal constitutional or statutory question is involved. (Specifications of Error Nos. 15, 16, 17, 18 and 24.)

ARGUMENT

I. The Right of Action Growing out of Fraud is Usually a Personal Right to the Extent That It Does Not Pass with an Assignment of the Thing to Which the Right Relates. (Specifications of Error Nos. 13, 23 and 26.)

The foregoing proposition of law was considered by the Arizona Supreme Court in the case of *Schwartz v. Durham,* 52 Ariz. 256, 80 P. 2d 456. In the *Schwartz* case, the appellant specifically in writing conveyed to the appellee as a part of the settlement of community rights incurred during marriage between the parties two hundred shares of stock in a Phoenix company, the sale of which by a California company to appellee gave rise to a cause of action for fraud instituted in a separate case brought by appellee, being settled by a payment of money by the California company. Appellant, becoming aware of the settlement of the cause filed by appellee separately for fraud, made demand upon appellee for one-half of the proceeds of the settlement, alleging that the assignment of stock by appellant to appellee did not transfer the cause of action for fraud, and secondly, that the settlement of the community rights of the property in the original divorce action settled only those rights which both parties knew to exist. In determining the case, the Arizona Supreme Court said:

> "The trial court apparently based its judgment on the belief that the transfer of the stock carried with it the cause of action as a matter of law." *Schwartz v. Durham,* 52 Ariz. 265, at page 263.

The appellant, in support of her theory that the transfer of the stock did not carry with it the cause of action for

fraud as a matter of law, cited to the Arizona Supreme Court the case of *Huston v. Ohio & Colo. S. & R. Co.,* 63 Colo. 152, 165 P. 251. The Arizona Supreme Court cited the foregoing case of *Huston v. Ohio & Colo. S. & R. Co.,* at page 252, as follows:

> " 'The right of action growing out of fraud is usually a personal right to the extent that it does not pass with an assignment of the thing to which the right relates. *Worsham v. Brown,* 4 Ga. 284; *Mullinax v. Lowry,* 140 Missouri App. 42, 124 S.W. 572; *Steele v. Brazier,* 139 Mo. App. 319, 123 S.W. 477; *Fox v. Hirschfeld,* 157 App. Div. 364, 142 N.Y. Supp. 261; 5 C.J. 952, Note 22e.' *and with this statement we agree.*" (Emphasis supplied.)

The court then further found that the wife did not contemplate transferring this cause of action in the property settlement because it was unknown to either of the parties at that time, and therefore, that no transfer was made via the property settlement. It is interesting to note that in the citations included in the quotation above is the case of *Fox v. Hirschfield,* 157 App. Div. 364, 142 N.Y. Supp. 261, wherein a plaintiff purchased land under a contract and assigned the contract to his wife. In a subsequent action for fraud, the court held that the right of action for fraud was not effectively assigned to his wife by an assignment to her of the contract. It further held that the damages to the plaintiff were the difference between the value of the property had the representations about it been true and its actual value.

It is the contention of the defendants Shepard herein that there was no fraud in the transaction out of which the present litigation grew, but that even if the court did find as a fact that a fraud had occurred, in view of the decision of the Arizona Supreme Court in *Schwartz v.*

Durham, cited above, such right of action was a personal one in Otto, Haas and the other seven original investors and was not one which could be transferred, in view of the Arizona law on the subject. The matter of assignability was reviewed a second time by the Arizona Supreme Court in the case of *Employers Casualty Co. v. Moore,* 142 P. 2d 414, 60 Ariz. 544. In this case the Arizona Supreme Court reiterated its former statement that rights of action for torts causing injuries which are strictly personal do not survive the plaintiff's death, and that whether or not a chose in action is assignable depends on whether it will survive assignor's death and pass to his personal representative. In the instant case it is clear that the action for fraud is indeed a personal one that would not survive under the Arizona statutes applicable at the time of trial in the District Court, and therefore, the cause was not one which could have been assigned to the plaintiff corporation.

If the District Court had followed the Arizona Supreme Court's rulings in the *Schwartz* case and the *Employers Casualty Co. v. Moore* case, cited above, it could not have made its Finding of Fact No. XVIII, which reads as follows:

> "Plaintiff has brought this action in its own right and as assignee of the rights of Otto and Haas."

The District Court should have made Conclusion of Law No. I, as submitted by defendants below, which read:

> "The Court does not have jurisdiction of the matter because plaintiff is not a proper party plaintiff."

and Defendants' Requested Conclusion of Law No. VI, which reads:

> "Fraud is never presumed, but must be shown by clear and convincing evidence." (Tr., p. 31),

for the reason that the plaintiff, Cal-Nine Farms corporation, appellee here, had no cause of action in its own right and could not have been an assignee of the rights of Otto and Haas or any other parties where such cause of action grew out of fraud, and was, therefore, incapable of showing by clear and convincing testimony that said corporation had ever been defrauded by the defendants, appellants herein.

II. Cal-Nine Farms, in Exercising the Rights of Otto and Haas Under the Option Agreement Dated the 17th day of November, 1954, Did Not Acquire the Right to Bring an Action Based on Fraud Against Elmer F. Shepard and Kathryn M. Shepard. (Specifications of Error Nos. 13 and 23.)

The Option Agreement dated November 17th, 1954 and attached to plaintiff's complaint as Exhibit A (Tr., p. 9), is nothing more than a bare option to purchase certain described real and personal property. This option gives to the parties signatory, to-wit, Ernest H. Otto and Henry Haas and their successors or assigns, the right to purchase the property for an agreed price of $80,000.00 on or before the 17th day of January, 1955. There was no attempt by the sellers, appellants herein, in the Option to Purchase of November 17th, 1954, to do more than agree to sell the described real and personal property to Otto and Haas their successors or assigns. Otto and Haas on their part in said Option to Purchase acquired no rights under said instrument, except to purchase for the agreed price or by inference, to convey said right to purchase to others.

Under the authority of *Schwartz v. Durham,* above, and *Employers Casualty Co. v. Moore* above, no right of action for fraud was assigned by said exhibit, nor could plaintiff, appellee herein, have acquired any right to bring an action based on said exhibit.

III. The Purported Assignment, Which is Plaintiff's Exhibit 8 in Evidence, Constituted an Attempt to Assign a Bare Action for Fraud, and, as Such, was not Assignable in the Absence of Statutory Authorization. (Specifications of Error Nos. 13, 14, 23 and 26.)

If the Court agrees that under Arguments I and II above the Cal-Nine Farms corporation acquired nothing in the Option to Purchase of November 17th, 1954 which would entitle it to bring an action in fraud against the defendants, then the right of said corporation to bring the action rests entirely upon plaintiff's Exhibit 8 (Tr., p. 24). It is to be noted that said exhibit was not executed until long after the action had been filed by the Cal-Nine Farms corporation, and, in fact, not until the issue was joined in trial in the District Court (Tr., p. 279). Additionally, as was mentioned in Argument under paragraph I, the said purported assignment could not pass any rights other than those owned by the signatories, if, indeed, any they did own. In the case of *Employers Casualty Co. v. Moore* hereinbefore cited, plaintiffs were lawyers employed to bring a personal injury action by reason of negligent operation of an automobile. The contract of employment was in writing and under the clients agreed to pay said attorneys for their services as follows:

"An amount equal to thirty-three and one-third percent (33-1/3%) of all sums recovered, whether by suit or compromise.

"This retainer shall operate as an assignment *pro tanto* to said Second Parties of any claim or right of recovery insofar as such assignment may be lawful arising out of, or instant to, the matter or matters in which Second Parties are retained to perform said services, and of anything received or collected therefor or of judgment obtained thereon."

Later the clients, without consulting their attorneys, compromised the matter for $1,900.00 with the insurance company representing the adverse parties. The lawyers who had received the foregoing quoted assignment then started an action against Employers Casualty Company, insurer of the adverse party, to recover the fee for their legal services, alleging that the insurance company with full knowledge of the contract between the lawyers and their clients induced the clients to settle and compromise their claim for an inadequate sum, upon the theory that the $1,900.00 paid under the compromise was two-thirds of the insurance company's admitted liability. The lawyer plaintiffs alleged that they were entitled to one-third of the sum of $2,850.00, or $950.00, for which they prayed judgment. The court, after hearing the case, gave plaintiffs judgment for the one-third of $1,900.00, or for the sum of $633.33. The company perfected an appeal to the Arizona Supreme Court, and its first assignment of error was as follows:

"1. The court erred in holding that the contract of employment operated as an equitable assignment *pro tanto* to the appellees, for the reasons that rights in actions for personal injuries are not assignable."

The sufficiency of this assignment was challenged, and the Supreme Court determined that the assignment conformed with its rules and that it was a plain and concise statement of the error charged. The court then held that said assignment was of no value, stating as follows:

> "(2-3) It is well settled in this jurisdiction that an action for personal injuries, such as the one here, does not survive. In *Deatsch v. Fairfield,* 27 Ariz. 387, 397; 233 P. 887, 891; 38 A.L.R. 651, it is said:
>
> " 'The test of assignability of a chose in action is whether it will survive and pass to the personal representative. If it will survive, it can be assigned . . . .'
>
> "This statement of the law was later approved in *United Verde Extension Mining Co. v. Ralston,* 37 Ariz. 554, 296 P. 262. The general rule is stated as follows: 'The general doctrine, both at law and in equity, is that rights of action for torts causing injuries which are strictly personal and which do not survive are not capable of being assigned . . . .' 4 Am.Jur. 252, §30.
>
> "In the absence of statutory modification, a cause of action for death by wrongful act is not assignable, and it has been held that, prior to verdict or judgment, the beneficiary's claim for damages is a mere expectancy, or inchoate right, not a debt, and not assignable. . . . ' 6 C.J.S. Assignments, page 1082, § 33."

The record below is devoid of any evidence which would indicate statutory authorization in the State of Arizona for the assignment of an action based on fraud, nor did plaintiff, at any time during the trial of the matter, contend that such statute did, in fact, exist. Plaintiff offered plaintiff's Exhibit 8, and the same was admitted in evidence over the objection of the defendants (Tr. p. 156), in an apparent effort to give Cal-Nine Farms corporation some standing in the District Court. In view of the Arizona Supreme Court's decisions in the cases of *Schwartz v. Durham, Employers Casualty Co. v. Moore* and *Deatsch v.*

Fairfield, cited above, the assignments gave the plaintiff no standing in court and conferred no jurdisdiction on the court on which it could base its Finding of Fact No. XVIII, which reads:

> "Plaintiff has brought this action in its own right and as assignee of the rights of Otto and Haas."

and such Finding of Fact was clearly erroneously when viewed in the light of the existing Arizona Supreme Court decisions in point. Defendants contend the same objection is valid as to the District Court's Conclusion of Law No. 1, which reads:

> "1. This court has jurisdiction of the parties by reason of diversity of citizenship. 28 O.S.C. 1332."

In view of the foregoing decisions, defendants contend that the District Court erred in refusing to conclude as a matter of law the matter set forth in Defendants' Requested Conclusion of Law No. 1, which reads:

> "The court does not have jurisdiction of the matter, because plaintiff is not a proper party plaintiff."

and Defendants' Requested Conclusion of Law No. 4, which reads:

> "An action for fraud is a personal action, not assignable."

IV. A Mere Right to Litigation for Fraud is a Personal Action and Prior to Judgment the Beneficiary's Claim for Damages is a Mere Expectancy or Inchoate Right, Not Assignable in Law or Equity Under Arizona Law, and Prosecution by the Alleged Assignee of an Action for Fraud is Contrary to Public Policy and Savors of Maintenance. (Specifications of Error Nos. 13, 14, 23 and 26.)

In support of the foregoing proposition, the Court is referred to the following cases: *Schwartz v. Durham,* 80 P. 2d 453, 52 Ariz. 256; *Employers Casualty Co. v. Moore,* 142 P. 2d 414, 60 Ariz. 544; *National Shawmut Bank of Boston v. Johnson,* 58 N.E. 2d 849, 317 Mass. 485; *Grand Trunk Western R. Co. v. H. W. Nelson Co.,* 116 Fed. 2d 823, rehearing denied 118 Fed. 2d 252; *Cochran Timber Company v. E. L. Fisher,* 190 Mich. 478, 157 N.W. 282; *Graham v. LaCrosse & M. R. Co.,* 102 U.S. 148, 26 L. Ed. 106. The Court's attention is particularly directed to the *Cochran Timber Company* case cited above, for the reason that that case is bottomed upon case law of Michigan, and the Michigan, Supreme Court's decisions in such instances are similar to those of the Arizona Supreme Court heretofore cited. The cases in many jurisdictions arise out of some type of statutory authorization, and are therefore, not always directly in point as the Michigan cases seem to be. The case of *Graham v. LaCrosse & M. R. Co.,* cited above, is deemed of value for the reason that the United States Supreme Court in that early landmark case cites the history of the development of the Arizona and Michigan rule in the common law of England and under the early American cases. This decision cites *Prosser v. Edmonds,* 1 Y. & C. 481 in

the Court of Exchequer, a landmark English case which holds the assignment of an action for fraud was opposed to the spirit of the common law and savored of champerty and maintenance.

V. A Corporation Cannot Bring an Action for Alleged Fraud Based upon Negotiations Between a Seller and Third Parties Occurring Prior to the Corporation's Legal Existence. (Specifications of Error Nos. 27, 13, 14 and 23.)

Under the Arizona rule, where the Supreme Court has stated that a personal action cannot be assigned, the Cal-Nine Farms corporation did not enter the trial possessed of any cause of action against defendants, and the attempt to convey such right by an assignment as evidenced by plaintiff's Exhibit No. 8 could not have clothed the corporation in such legal right. This is evidenced by a case directly in point decided by the New York Supreme Court in 1952 in the matter of *Nearpark Realty Corporation v. City Investing Company,* 112 N.Y. Supp. 2nd 816. New York, at the time of this case, had a special statute authorizing the assignment of a cause of action for alleged fraud (§41, Personal Property Law). The plaintiff corporation as an assignee of a contract to purchase real estate sought to rescind on the grounds of fraudulent concealment. At the time the contract was entered into, the plaintiff corporation was not yet in existence. The New York Supreme Court held, in Paragraphs (1-3):

> "It follows that only the plaintiff's assignor may rescind or sue for damages for fraud and deceit; the representations were made to it alone and it alone had the right to rely upon them, since there was not an assignment to the plaintiff of the cause of action for re-

cision or of the cause of action for fraud and deceit. *Fox v. Hirschfield,* 157 App. Div. 364, 365; 142 N.Y. Supp. 261, 262. In the case cited, the court declared that in the absence of an assignment of a cause of action based upon the fraud *as distinguished from an assignment of the contract of purchase of the property,* the cause of action belongs to the assignor. (Emphasis supplied) . . . .

"The fact that the plaintiff and its assignor may have identical officers, directors and stockholders is of no legal consequence, since for the purpose of the present action they must be regarded as separate and distinct entities. Defendant's representations, whether active or passive, were not made to the present plaintiff, but to its assignor."

The defendant's motion to dismiss was granted in a similar case decided in New York in 1952 in the matter of *Weylin Hotel Corp. v. Ritter, et al,* 114 N.Y. Supp. 2d 158, which was an action to rescind the contract of sale of a hotel wherein the alleged misrepresentations were made January 30th, 1951 and the plaintiff corporation was incorporated the next day, January 31st, 1951, on which date the contract was assigned to the plaintiff. It was held there was no assignment of the cause of action to the plaintiff. In this case the court held:

. . . . "The rule seems well established that the assignee of the original contract, under the facts so alleged in the present complaint, may not sue the vendor for fraud allegedly inducing the contract. *Guilfoyle v. Pierce,* 125 App. Div. 504; 109 N.Y. Supp. 924; *Fox v. Hirschfield,* 157 App. Div. 364; 142 N.Y. Supp. 261; *Ettar Realty Co. v. Cohen,* 163 App. Div. 409; 148 N.Y. Supp. 659. . . ."

Defendants wish to point out to the Court that in the case of *Fox v. Hirschfield* cited above by the New York

Supreme Court in the case of *Nearpark Realty Corporation v. City Investing Company,* cited above, the court was in full accord with defendant's position that an assignment of the contract of purchase of property does not constitute an assignment for an action in fraud. The record at the trial reveals that the plaintiff's witness Otto testified he did not remember and did not know whether any assignment had ever been made to the Cal-Nine Farms Corporation (Tr., p. 138), admitted that the assignment admitted in evidence by the court was executed the day of the trial (Tr., pp. 154-155), and further, that the Cal-Nine Farms corporation never made any acceptance of that assignment or knew anything about it (Tr., p. 155). Proper objection to its admission was made at this time, but the same was admitted by the court (Tr., p. 156). The partner Haas also testified (Tr., p. 279) that the purported assignment, which is plaintiff's Exhibit 8 in evidence, was executed at noon on the first day of the trial. The witness Haas also testified (Tr., p. 279) that he recalled the corporation had authorized the instant lawsuit, but was unable to state a date, and Cal-Nine Farms, plaintiff below, never produced corporate minutes to prove this statement (Tr. p. 279). This situation was again brought to the court's attention by a proper motion for the defendants at the close of the plaintiff's case (Tr., pp. 314, 315).

VI. Fraud is never Presumed, but Must be Shown by Clear and Convincing Evidence. (Specifications of Error Nos. 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 19, 20, 28 and 30.)

The foregoing proposition has long been cited by the Supreme Court of Arizona as the law in that jurisdiction. *Schwaibach v. Jones,* 27 Ariz. 260, 232 P. 558; *Cole v. Town of Miami,* 83 P. 2d 997; 52 Ariz. 488.

Did the plaintiff sustain the burden of proof and prove its case by clear and convincing testimony in the District Court? Defendants think not and point out to the Court that there are nine elements of actionable fraud under the Arizona rule, to-wit:

1. A representation.
2. Its falsity.
3. Its materiality.
4. The speaker's knowledge of its falsity or ignorance of its truth.
5. His intent that it should be acted upon and in the manner reasonably contemplated.
6. The hearer's ignorance of its falsity.
7. His reliance upon its truth.
8. His right to rely thereon.
9. His consequent and proximate injury.

Wood v. Ford, 72 P. 2d 423, 50 Ariz. 356;

Stewart v. Phoenix National Bank, 64 P. 2d 101, 49 Ariz. 34;

Sims Printing Company v. Kerby, 106 P. 2d 197, 56 Ariz. 130.

Taking each of these elements in order, defendants feel that plaintiff failed completely to prove its case by clear and convincing testimony in the District Court, and cite the record to the Court as follows:

1. *A representation.*

The first conversation between plaintiff and defendants below occurred, according to the testimony of Otto, in approximately October, 1954, and was related in court as follows (Tr., pp. 86-87):

> "Q. Would you state the conversation?
>
> "A. Well, I was on the end of the rows there just waiting for the pickers to come up, and Elmer, he rode up on horseback that day, and we just had a general conversation, and I asked him if their ranch was for sale, that is, Gordon Cameron and Ed Swindle told me it was for sale, and I just wanted to find out if it was.
>
> "Q. And what did Mr. Shepard answer?
>
> "A. He said yes, he was trying to sell it.
>
> "Q. Was there any discussion of price?
>
> "A. Yes.
>
> "Q. Did Mr. Shepard quote a price at that time?
>
> "A. Yes.
>
> "Q. What price did he quote?
>
> "A. $80,000.
>
> . . . .
>
> "Q. Did you have any discussion as to the well on the land at this time, at that time you first talked to Mr. Shepard about the property?
>
> "A. I think we did.
>
> "Q. Will you state that discussion.
>
> "A. Well, I asked him several questions about it, and I asked him about the land and the condition of the place.

"Q. And what were his responses?

"A. Well, he said it was a good ranch. And I asked him why he wanted to sell it, and he said he had trouble with his eyes. He said the dust out there bothered his eyes, and he wanted to sell it so he didn't have to go out there anymore."

The witness Otto then related another conversation allegedly taking place in November of 1954, as follows (Tr., pp. 88-89-90-91):

"A. I asked him what the output of the well was, and he told me it was 2200 gallons per minute.

"Q. Were those the words he used?

"A. Yes. He said Jules Turner estimated the pump as throwing 2400 gallons per minute, but he said he didn't think it was quite doing that. He said, 'I think it is throwing 2200 gallons.'

"Q. Did he run the well on the land at that time?

"A. Yes.

"Q. He turned on the pump?

"A. Yes.

"Q. How long did it run?

"A. I would say 10 or 15 minutes, just a short while.

"Q. Did you make any observation as to the character of the water coming out of the pump?

"A. Yes.

"Q. What observation was that?

"A. Well, we seen the water coming out. Is that what you mean?

"Q. Well, did you notice anything about the water coming out of the pump?

"A. Yes, I noticed it was unusually dirty looking water.

"Q. Did you say anything to Mr. Shepard about that?

"A. Yes.

"Q. What did you say?

"A. I told him, I said, 'Boy, that is sure dirty looking water coming out of there.'

"Q. What did he say?

"A. He said, 'Yes, they all do that when you first start them up.'

"Q. Did Mr. Shepard make any other statements to you at this time about the capacity of the well, or its condition?

"A. Yes.

"Q. What were those statements?

"A. He told us the well and the pump, and everything was in good condition, that it was a gravel packed well, and it was in good condition.

"Q. Did you make any inquiry as to whether he had ever had any trouble with the well?

"A. Yes.

"Q. What did you ask him?

"A. I asked him if he ever had any trouble with his well.

"Q. And what did he say?

"A. He said, 'Well, we had a little trouble here.' 'But,' he said, 'you really couldn't class it as trouble.' He said that the pump people told him the engine was not tuning up right, and the engine people told him there was something wrong with his pump, so he said they ended up pulling the pump out of the hole, and found out everything was in good condition, and there was something wrong with the engine, and he had that taken care of.

"Q. Did he make any further statement to you about the previous history of the well?

"A. I don't believe he did.

"Q. Did he ever say anything about Mr. Cameron having gone back in the well?

"A. Yes.

. . . .

"Q. And what was that statement?

"A. He told me that Mr. Cameron went back into the well, and they deepened that hole. I forget exactly how many feet, but he said from what depth to what depth that he went.

"Q. Did Mr. Shepard make any statement to you at this time about the tube capacity of the well?

"A. Yes.

"Q. What was that statement?

"A. He said it would handle 70 to 75 siphon tubes."

Enlarging upon the foregoing conversations on cross-examination, the witness Otto testified as follows (Tr., p. 133):

"Q. Now, Mr. Shepard, at the time you were discussing this in September, said that the well was in good repair, is that right?

"A. Yes.

"Q. Did he tell you when he had last repaired it?

"A. Yes, he said when it was out of the hole they had repaired it.

"Q. That was in the preceding July and August?

"A. I forget. A short while before that.

"Q. It hadn't been very long?

"A. No.

The witness Haas also testified in regard to conversations between Otto, Haas and Elmer Shepard, as follows (Tr., pp. 266-267-268-269):

"Q. Mr. Haas, I think right now it would be better if you would confine yourself to the details leading up to the conversation with Mr. Shepard.

Did Mr. Shepard come up to your while you were on the property?

"A. Yes. We were there about 10, 15 minutes, when he come up, driving up in his pickup.

"Q. What happened then?

"A. Well, Ernie introduced me to him, and we got to talking about his ranch.

"Q. Did he at that time turn on the pump?

"A. Well, yes, we talked to him about possibly buying the place, but we says, well, we would like to see how this pump works, and how much water it throws. Therefore, he started the pump.

"Q. What was the appearance of the water coming out of the pump?

"A. To me it looker like a stream was coming out.

"Q. Did you notice anything about the water?

"A. Well, it was muddy, yes.

"Q. Did either you or Mr. Otto make any comment about that to Mr. Shepard?

"A. Ernie says, 'Gee, that water is muddy.'

"Q. Did Mr. Shepard make any response to that comment?

"A. He says, Yes, that is the way these desert pumps are.

"Q. Yes?

"A. And after you run them a while, it clears up.

"Q. Did Mr. Shepard at that time make any other comments or statements to you about the well on the property?

"A. Yes, I believe Ernest asked him how many gallons of water it was throwing, and he said one of them ranchers out there, I believe Turner is his name, had estimated that 2400 gallons a minute, but he said he estimated it at 2200.

"Q. Did he make any other statements about the well?

"A. Well, yes. We got to talking around there, and at that same time one of these, oh, I believe one of

them cotton pickers come up there, the mechanical cotton pickers, he was off a ways, and Ernie walked off a way to take a look at it, that was a different brand than he was running, and I says to Elmer, I said, 'Man, that sure looks desolate out there, all this desert. If there was no water out here, it wouldn't be worth anything.'

He said, 'Well, I'll almost bet my bottom dollar you've got enough water here for a cotton crop.'

. . . .

"A. Yes, that was on the ranch there. Then I had also asked him, if this was such a good place, why he was willing to sell it.

"Q. And what was his response to that?

"A. Well, he told me he had quite a bit of trouble with his eyes, and that I believe he said he went to the Mayo Clinic about that. I am not sure, and had them examined, and that these doctors had told him to stay out of excessive dust, and that road out in this Harqua Hala Valley is tremendously dusty, and therefore he was trying to sell the place.

"Q. Did either you or Mr. Otto inquire as to any trouble he might have had with the well or pump?

"A. Yes, he asked him about trouble, and this and that.

"Q. And what did he state in response to that?

"A. He said he just had the ordinary trouble, the ordinary trouble.

"Q. Did he go into any detail?

"A. Not too much. He just said he had the thing fixed, and that is all I know about it."

Haas testified, additionally, about a second conversation at a motel in Buckeye, Arizona on the night of November 17th (Tr., p. 270), as follows:

"Q. Did Mr. Shepard make any statement to you about the condition of the well?

"A. He done that all along. I kept asking him all along. Naturally you would be worried about the water condition.

"Q. What was that statement?

"A. Well, he said the well was in perfect condition."

The foregoing conversations, as elicited from the mouths of the plaintiff's witnesses, cannot be construed even in a light most favorable to the plaintiff as anything more than mere expressions of opinion.

2. *Its falsity.*

Were the foregoing statements attributed to the defendant Elmer Shepard false? The record reveals on the contrary that each and every statement attributed to him was true. Otto testified that Shepard, in referring to the capacity of the well, stated, "I think it is throwing 2200 gallons." This statement, even as related by Otto, could be nothing more than mere opinion, and the record is devoid of any testimony indicating that Shepard did not, in fact, believe the truth of that allegation. However, comparing Shepard's alleged statement with those of other witnesses of the plaintiff, we find corroboration for his estimate. Plaintiff's witness Vern A. Tower, a salesman for State Tractor & Equipment Company, testified that he had estimated at one time the Shepard well would produce 2500 to 2600 gallons per minute. (Tr., p. 303). He additionally stated that after Shepard had the well repaired that the repair job brought the capacity of the well up again. (Tr., p. 301). He then modified this statement and stated that the well and pump produced a "fair head" of water. (Tr., p. 302). He additionally stated that after the last repair to the bowls on the pump, as follows:

"A. That is right. He was getting sufficient water for the crop, and he was very happy, and we were very happy he was happy." (Tr., p. 304)

The plaintiff's witness Gordon Cameron, a well driller who lived in the area, testified that he had deepened the well in 1953, and made the following statement in regard to its capacity (Tr., p. 203):

"Q. Did there seem to be any difference in the capacity of the well after you had deepened it, and the capacity before?

"A. Yes, it was a little better."

He additionally testified as follows (Tr., p. 201):

"A. I might explain, if the deepening job would go off like we had hopes it would. We had a lot of trouble trying to get circulation. We wanted to go to 1500, but we couldn't do it.

"Q. That was because there was too much water down at the bottom?

"A. No, we never could get circulation back.

"Q. You put mud down at the bottom?

"A. Yes.

"Q. And that kept washing way, is that correct?

"A. Yes.

"Q. When Mr. Rehnquist asked you if there was water in the hole, there was water for a considerable distance above 1000 feet, is that correct?

"A. Yes.

"Q. Where was the water level?

"A. I think it was right close to 200 feet."

the above statement indicating clearly there was so much water in the well it was impossible to drill deeper. The defendants' witness Ernest Wood, who was an employee

of the well driller, Gordon Cameron, at the time complained of in plaintiff's complaint, testified that he was present with the witness Otto at the time the pump and well were first started up after Cal-Nine Farms exercised the option to purchase the property. His testimony was as follows (Tr., pp. 334-335):

"Q. After the deal was closed, did you have any occasion to assist Mr. Otto on the property?

"A. Yes, sir.

"Q. When was that?

"A. That was when he first started his pump."

"Q. Do you recall approximately when that was?

"A. That was in April of 1955.

"Q. Who started the pumps, Mr. Wood?

"A. I started the pump going myself.

"Q. Who laid out the tubes, if any were laid out?

"A. There were a number of tubes laid out, and I believe he and Ed laid them out, as far as I know. The tubes were laid out when I got there.

"Q. How many tubes were there?

"A. There was possibly 100 tubes, or better.

"Q. When you started up the pump, did it work?

"A. Yes, sir.

"Q. What did you do then?

"A. Let the water build up a little bit in the ditch, and started the tubes going.

"Q. How many did you start?

"A. 72.

"Q. Did you get them all running?

"A. Yes, sir.

"Q. Did you do any more that particular day, then?

"A. No, just told him, showed him, and tell him how the water was to go, and how it helped to watch

it. But he didn't stay. As I recall, he was gone, and he was very pleased with the well, and stood there and told me how proud he was of the place, which it is a nice place, very nice."

Under cross-examination by plaintiff's counsel, he reaffirmed this statement, as follows (Tr., pp. 342-343):

"Q. You had occasion to help Mr. Otto start the water in the spring of 1955?

"A. Yes, sir.

"Q. How long were you over there that first day?

"A. I was there long enough to start the pump and get the hose to running.

"Q. Give me some estimate of time.

"A. Probably three hours. When I got the hose to run I stayed around probably three hours.

"Q. It was ten days after that you came back?

"A. Yes, sir.

"Q. You weren't there at all in the intervening period?

"A. I was just across the fence several times, until I left Mr. Cameron and went over to Mr. Massingale's.

"Q. Could you see across the fence the number of tubes Mr. Otto had out?

"A. Yes.

"Q. About how far is that?

"A. From the fence to where his ditch was?

"Q. Yes.

"A. Approximately a couple hundred feet.

"Q. Did you say there was water going through 72 tubes?

"A. Yes, sir, two-inch tubes.

"Q. And did that continue for all of the three hours you were there?

"A. Yes, sir.

. . . .

and as follows (Tr., p. 344):

"Q. When those 72 tubes started up, Mr. Wood, did you see any of them at all stop?

"A. Yes, sir.

"Q. How many of them?

"A. There was just a very few which they didn't let the water raise high enough in the ditch. They started to start the tubes a little too fast. Then you have always got to go and regulate your water, regardless.

"Q. Some of those tubes did start?

"A. Yes. I started them all, and they were all running.

"Q. Then they stopped after that?

"A. When I left, there was 72 tubes running.

"Q. They were all running water through them?

"A. Yes.

In regard to the defendant Shepard's statements as to the condition of the pump, the witness Lyman Miller, a mechanic and trouble shooter for the Arizona Engine and Pump Company, testified in regard to the repairs done on the pump in July, 1954, as follows (Tr., pp. 346-347-348):

"Q. I have a statement here from State Tractor with regard to that work. That was the job you did, is that correct?

"A. That is right. We pulled it out and overhauled the bowls.

"Q. What was the nature of the work you did on that pump at that time?

"A. Well, we replaced the impellers and the shafting and the bearings in the bowl, and did some line shaft work on it.

"Q. You personally either did the work or oversaw it done, is that correct?

"A. I did the bowl work, yes.

"Q. All that work was done in your shop?

"A. Absolutely.

"Q. Who reinstalled it, then, in the well?

"A. At that time, State Tractor's boys.

"Q. And did you have occasion to see how it worked after it was reinstalled?

"A. I did.

"Q. Had you ever seen that well before, Mr. Miller?

"A. I had.

"Q. When did you first observe it?

"A. When it was new, first put in, and I installed it.

"Q. You had charge of the pump work at that time, too, is that correct?

"A. I wouldn't say in charge of it. I am more or less a troubleshooter for them, look after stuff like that.

"Q. Had you had other occasions in 1953-1954 to see that particular well?

"A. Yes.

"Q. You were familiar with it?

"A. Yes.

"Q. After the installation and repair work you did in July, 1954, did you see the well when it was turned on and the water pumping?

"A. Yes.

"Q. Was there a difference between the appearance of the water and its production at that time, and your other observations of it?

"A. Not that could be noticed.

"Q. Would you say that was a complete overhaul of the pump?

"A. Yes, I would say that was a complete job.

"Q. What actually is done to restore a pump in a case like that?

"A. It is pulled out, the line shaft checked, the bearings checked, and the bowls opened up. They are assembled, each bowl in itself is an assembly, and they are all pulled apart and inspected, and any parts that can be replaced up to as good as new is replaced.

"Q. Did you do that on this particular job?

"A. We did.

"Q. Were you satisfied with your work?

"A. Yes."

Plaintiff's witness Simcoe Walmsoley testified he had seen the well the first of September, 1955, when Otto was running it and that it was a pretty good well (Tr., p. 285).

William Kimes, a service man for Arizona Engine and Pump Company, testified in regard to the pump that it was "it was in pretty good shape." (Tr., p. 351).

In regard to Shepard's statement in regard to the silting condition of the water pumped from the well, plaintiff's witness Gordon Cameron testified that while there was sand and silt in the Shepard well, it pumped plenty of water to irrigate Shepard's land (Tr., p. 201). The witness Cameron admitted it was a condition similar to that in his own well, but that there was a strong flow of water at the bottom of both his well and the Shepard well (Tr., p. 223), and that the silting condition would clear up (Tr., p. 213). The Court will recall that the plaintiff's witness Haas stated that he and Otto observed the silty condition of the water and remarked on it.

Shepard's statement as to the well having gravel in it was confirmed by plaintiff's own witness Cameron again (Tr., pp. 201-202).

Analyzing the testimony of Otto and Haas heretofore quoted to the Court, with citations, it is plain that Shepard

advised them the well had had work done on it to deepen it, that the bowls had been pulled and repaired and that the engine had had repairs, and yet it is on the basis of these facts, apparently, that plaintiff alleges it was defrauded.

3. *Its materiality.*

Plaintiff concedes that representations made to a purchaser who is unable to avail himself of the opportunity to investigate are usually material in a case based on fraud. In the instant case, however, plaintiff does not occupy such a position. It is defendants' contention that the statements attributed to Shepard were mere statements of opinion, for the most part, and therefore, could not be material in the sense that a representation is material. Defendants will discuss this in detail in item number 7 in regard to the reliance of the plaintiff, if any.

4. *The speaker's knowledge of its falsity or ignorance of its truth.*

Defendants refer the Court again to Argument under item 2 immediately above, which defendants contend substantiates the truth of the opinions stated by Shepard.

5. *His intent that it should be acted upon and in the manner reasonably contemplated.*

Has plaintiff shown that Shepard made the statements attributed to him with the intent that they should result in the plaintiff's purchase of the land in question? Defendants believe that the record is clear that the intent to purchase the land was not caused by any statements of Shepard, but was an independent agreement of the nine men who subsequently formed the Cal-Nine Farms Corporation, and that their intent to purchase became a reality long before

their representatives, Otto and Haas, ever contacted Shepard. In this regard, the Court is referred to the statements of the witnesses Otto and Haas, as follows—Otto testified on direct examination by counsel as follows (Tr., pp. 92-93):

"Q. Did you make any inquiries of anyone else regarding the well on this property?

"A. Yes.

"Q. Was this before the time you talked to Mr. Shepard in the conversation you just related, or after?

"A. Before.

"Q. Who else did you make inquiries of?

"A. I spoke to Gordon Cameron about it.

"Q. Does Mr. Cameron operate a ranch in that area?

"A. Yes, he is a neighbor, he adjoins me on the west, and he is also a well driller. And he deepened this well. That is the reason I questioned him, because I thought he knew about it.

"Q. When you say he adjoins you on the west, I take it before you bought the property, he would have adjoined Elmer Shepard on the west?

"A. Yes.

"Q. What inquiry did you make of Mr. Cameron?

"A. I was just trying to pick up general information on the ranch, and I asked him about the land, and the water conditions, and everything in general.

"Q. And what did Mr. Cameron state to you?

"A. Well, he kept telling me it was an awful good ranch, and that the water conditions were all right on it, and the land was very good.

"Q. Who else did you make inquiry of?

"A. Ed Swindle.

"Q. And who is Mr. Swindle?

"A. He is the manager of the Centennial farms.

"Q. And does he operate a ranch for Centennial Farms in that area?

"A. Yes.

"Q. What inquiry did you make of Mr. Swindle?

"A. It was about the same thing as I did to Mr. Cameron. I was new in the territory, and I was trying to pick up information from the neighbors as to how good this ranch, and everything was.

"Q. And what did Mr. Swindle tell you in response to your inquiries?

"A. He told me about the same thing, that it was an awful good piece of land.

"Q. Did he say anything more than that?

"A. Well, we talked a lot. I can't remember the exact words we talked about. He just referred to it as a good place.

"Q. Did you shortly after the conversation you have described with Mr. Shepard in the middle of November enter into a written agreement with him?

"A. Yes."

In addition to the foregoing, the witness Otto on cross-examination was asked the direct question in regard to intent, as follows (Tr., pp. 126-127):

"Q. When did you first get the idea of buying the Shepard property?

"A. I would say it was sometime in October, the later part of October.

"Q. How did that come about?

"A. Gordon Cameron and Ed Swindle, I got to know pretty well, because I was working with them, and they told me, Why didn't I try to buy a ranch over here. They said, 'We need some more neighbors out here. We want to make this valley boom out here.'

"That is when I first got interested. They were telling me the Shepard place was for sale at that time.

"Q. It was not due to any solicitation from Mr. Shepard that you bought the property?

"A. No.

"Q. Was that the first you talked to Cameron and Swindle about the property, and what it would do?

"A. Yes."

The defendant Haas also indicated the intention to buy occurred prior to the conversation between Shepard, Otto and Haas, and stated under direct examination by his counsel, as follows (Tr., p. 265):

"Q. Did you have occasion to come to Arizona in 1954?

"A. Yes, I did.

"Q. When was that, do you remember?

"A. Well it was in November. I believe we left Fresno November 15th.

"Q. And did you come over with someone?

"A. Came over with Ernest Otto.

"Q. That is the Ernest Otto who has previously testified in the action?

"A. That is right.

"Q. What was the purpose of that trip to Arizona?

"A. Well, he come over there in, I believe it was the end of October, and he said he would like to maybe buy a ranch over here, that is, the fellows he was picking cotton for thought it was a good buy, and this and that, and he wanted to see about it, but he didn't have any money, I mean, actual cash, and a little short of it, so I says, well, maybe I can raise some. Therefore, I saw, oh, maybe a few of the fellows, four or five or six, and we decided, well, to put in a little money and help him buy it.

"Q. And the purpose of the trip to Arizona was to actually effect the purchase of this land?

"A. Yes.

"Q. Or of some land?

"A. Of some land, yes."

Under cross-examination, the witness Haas testified in regard to intent as follows (Tr., p. 272):

"A. Well, when Ernie first come over with a proposition of buy the place, why, I contacted these fellows, and then my other brother-in-law called the attorney, and asked him whether that thing would work all right that way.

"So we come over and picked up the Option, and then we went back and had a meeting right in the attorney's office.

"BY MR. BURCH:

"Q. In November?

"A. Yes."

. . . .

and as follows (Tr., pp. 273-274):

"BY MR. BURCH:

"Q. When you came over with Mr. Otto, you already had your friends committed for the sum of $80,000.00, hadn't you, you and Mr. Otto, and the other men altogether were committed to $80,000.00, isn't that right, for the purchase of the land?

"A. I believe so.

"Q. You didn't have any other land in mind but Mr. Shepard's, did you?

"A. At what point are you referring to?

"Q. When you and Mr. Otto came over in November.

"A. You mean the very first time?

"Q. On the 17th of November, when you entered into the Option Agreement.

"A. Did I have any other land in mind, you mean?

"Q. You, or these eight men you testified went in with you to purchase this property.

"A. We just had in mind whatever Ernie had in mind, that is all I know.

"Q. And Ernie had told you he had a piece of property he wanted to buy for $80,000.00, isn't that right?

"A. That is right.

"Q. And you had all agreed to go with him and buy it?

"A. Yes.

"Q. And you had already put up your earnest money, so to speak? You had that in your pocket, $2,000.00?

"A. That is right.

"Q. You had already agreed at that time to purchase the land, hadn't you, among yourselves?

"A. Yes, if Ernie thought it could be bought, and that it was a buy.

"Q. That is right.

"A. None of the other fellows are farmers.

"Q. They all relied on Ernie, didn't they?

"A. That is right.

"Q. And you did, too?

"A. That is right."

. . . .

and as follows (Tr., pp. 274-275):

"Q. And you had had Mr. Otto make an extensive investigation out there in regard to the well and land, didn't you?

"A. I don't know whether you would call it real extensive. The way he told me, you don't exactly go around and pull the people's pumps out of the well and inspect the insides of them. That costs a lot of money, I understand.

"Q. Mr. Otto had told you that?

"A. Yes.

"Q. You had discussed the well, and he, at your direction, asked many people in the community out there what the situation was, hadn't he?

"A. I believe he was relying on this Gordon Cameron's word quite a bit, his knowledge of the well.

"Q. He had made some thorough discussion—he had had a thorough discussion with Mr. Cameron, is that correct?

"A. That is what he said. That is all I know.

"Q. At the time you talked to Mr. Shepard, this had all been done, hadn't it, the discussion with Mr. Cameron and the other investigation he made?

"A. I believe so."

In regard to the purpose of the trip of Otto and Haas to the ranch, Haas again testified as follows (Tr., p. 275):

"Q. The only thing that remained to do was to try to close the deal with Mr. Shepard, isn't that true?

"A. On my part. That was my part, yes, as far as I know."

From the foregoing conversations, as related by plaintiff's own witnesses, defendants contend that it is obvious that Otto and Haas and their seven co-investors in California made a decision to buy the Shepard ranch property before Otto and Haas contacted Shepard, and that Shepard's relationship with them, as deducted from the testimony of Otto and Haas, cannot in any way be construed to show that his actions were deliberately calculated to influence the purchasers to buy the land in question.

6. *The hearer's ignorance of its falsity.*

The defendants contend that a perusal of the record will clearly demonstrate that the defendant Elmer Shepard

made no false statements to the plaintiff corporation, inasmuch as the record shows it was not in existence at the time the alleged statements were made. Additionally, the defendants believe that the statements attributed to Shepard, and as set forth under the preceding five subsections immediately above, were in fact true and that the witnesses Otto and Haas, by separate investigation of their own, were aware of the true situation. This matter will be further discussed under sub-paragraph 7 following.

7. *His reliance upon its truth.*

Defendants have detailed to the Court the statements that plaintiff's witnesses attributed to the defendant Elmer F. Shepard upon which the allegation was founded. The record reveals that they were on notice that the water pumped out of the well was dirty when the pump was first started up (Tr., p. 89). Further, they were aware that Shepard had had some trouble with his pump (Tr., pp. 89-90), that the well had been deepened (Tr., p. 91), and Shepard's estimate of the gallonage being pumped from the well (Tr., p. 88).

Again referring to the statements of Otto and Haas, the record is replete with evidence that they did not rely on any statements of Shepard, but in fact, made investigations of their own, which were thorough and exhaustive, and on which, by their very own statements, they relied (Tr., pp. 274-275). At the risk of being repetitious, defendants wish to point out the following statements of the witnesses Otto and Haas to the Court in regard to this point. The witness Otto testified that before he ever made inquiry of the defendant Elmer Shepard in regard to the sale of the ranch, he had made inquiries of the witness Gordon Cameron in regard to the ranch (Tr., p. 92). Otto testified in court as follows (Tr., p. 92):

"Q. What inquiry did you make of Mr. Cameron?

"A. I was just trying to pick up general information on the ranch, and I asked him about the land, and the water conditions, and everything in general.

"Q. And what did Mr. Cameron state to you?

"A. Well, he kept telling me it was an awful good ranch, and that the water conditions were all right on it, and the land was very good."

and also that he contacted another farmer in the area, as follows (Tr., p. 93):

"Q. What inquiry did you make of Mr. Swindle?

"A. It was about the same thing as I did to Mr. Cameron. I was new in the territory, and I was trying to pick up information from the neighbors as to how good this ranch, and everything was.

"Q. And what did Mr. Swindle tell you in response to your inquiries?

"A. He told me about the same thing, that it was an awful good piece of land."

Additionally, Otto testified that he had talked to Gordon Cameron's foreman, Woody, in regard to the production of water on the Shepard property (Tr., p. 127), and that he made an inspection of the property (Tr., p. 128). Otto also testified that he did not rely on the statements of Shepard, as follows (Tr., pp. 131-132):

"Q. You have already stated you could estimate reasonably the output of one of these wells, that is true?

"A. Yes.

"Q. And it was your estimate it was doing about 2000?

"A. Yes.

"Q. You didn't rely on his statement of 2200? You were relying on your own experience?

"A. I thought Elmer knew what he was talking about.

"Q. But you were relying on your own experience, weren't you?

"A. To a certain extent, yes.

"Q. You had also gone around and made inquiry as to what the well would do, in the way of capacity?

"A. Yes.

"Q. Did you rely on those statements made to you?

"A. Yes.

"Q. So it was not only the statements you got from Mr. Shepard, but also your own experience, and the statements of other persons that led you to believe it would do 2000 gallons?

"A. Yes."

and Otto additionally testified that he was satisfied with his own investigation of the Shepard property and that he thought Mr. Shepard was stretching the truth when he made his estimate as to the capacity of the well, stating as follows (Tr., pp. 152-153):

"Q. You were not prevented in any manner from inspecting the property or the machinery and the equipment on it, were you?

"A. No.

"Q. And at the time that you and Mr. Haas entered into the Option Agreement with Mr. Shepard, you were satisfied with your own investigation of the property, were you not?

"A. Yes.

"Q. And you had relied on no one's statement of fact except your own investigation of what you could determine was true?

"A. No, I relied upon all the information I got from my neighbors, and everyone else.

"Q. From the neighbors?

"A. And Elmer Shepard.

"Q. Isn't it true when you had your conversation with Mr. Shepard in regard to the capacity of the well, you thought he was stretching it when he told you that there was 2200 gallons it would produce?

"A. I had an estimate close to 2000, but I figured he knew what he talking about. He owned the well.

"Q. My question was, you thought he was stretching it a little at that time, didn't you?

"A. Yes."

The witness Haas, also testifying on behalf of the plaintiff, under cross-examination, as follows (Tr., pp. 274-275):

"Q. And you had had Mr. Otto make an extensive investigation out there in regard to the well and land, didn't you?

"A. I don't know whether you would call it real extensive. The way he told me, you don't exactly go around and pull the people's pumps out of the well and inspect the insides of them. That costs a lot of money, I understand.

"Q. Mr. Otto had told you that?

"A. Yes.

"Q. You had discussed the well, and he, at your direction, asked many people in the community out there what the situation was, hadn't he?

"A. I believe he was relying on this Gordon Cameron's word quite a bit, his knowledge of the well.

"Q. He had made some thorough discussion—he had had a thorough discussion with Mr. Cameron, is that correct?

"A. That is what he said. That is all I know.

"Q. At the time you talked to Mr. Shepard, this had all been done, hadn't it, the discussion with Mr. Cameron and the other investigation he made?

"A. I believe so."

Additionally, Haas testified that Otto told him he had talked to people around the neighborhood about the condition of the place (Tr., p. 277), and further indicated that Otto was making a thorough investigation, as follows (Tr., p. 277):

"Q. Did Mr. Otto ever advise you he had talked to Woody about the water supply?

"A. He told me he had talked to people around the neighborhood about the condition of the place.

"Q. What did he tell you he had discovered about the water supply?

"A. He told me it sounded all right to him, but it seemed like he just couldn't get to the bottom of it."

The defendants' witness Wood testified that he had met Otto prior to his conversations with Shepard (Tr., p. 328), and that he knew he was interested in purchasing property in the area and had several discussions with him (Tr., p. 329). Wood testified specifically as follows (Tr., p. 330):

"Q. Can you recall any of that specifically, when you discussed the wells?

"A. One afternoon we were sitting there at home, and we were talking about Mr. Cameron's well.

"Q. Who is 'we'?

"A. Mr. Otto and I. And talking about the wells, and he asked me about these pumps in these wells. He said he was not familiar with them, and he asked me if I was. And I told him I had seen a lot of them pumped in 20 years. He wanted to know

if it would go dry. I told him I hadn't seen any go dry yet. You never know. We discussed matters there, and I told him we had a little silt condition there at that particular place, and talked about gravel packing, and I even started the well for him.

"Q. That is Mr. Cameron's well.

"A. Yes, sir. And the well was started several different times during the fall, and he was there picking. I had a little alfalfa I had to water several times, and I had to start my motor every other morning, because after you get your regular drawdown of your well—I had an overhead tank for domestic use—so when you get your well drawed down the silt would start."

Wood further testified, as follows (Tr., pp. 331-332):

"Q. Did you ever discuss Elmer Shepard's well at any time with Mr. Otto?

"A. Yes, sir.

"Q. What, if anything, did you say to him with regard to that?

"A. He asked me, 'How is Elmer's well in comparison with this one?'

"And I said, 'No difference between the wells that I can see. I can't see any difference at all. However, Elmer's well will clear up a little faster than Gordon's will, the silt condition there.' "

Wood further testified that Ed Diebert, a brother-in-law of Otto's, took soil samples of the Shepard property to Mr. Otto in California (Tr., p. 332). This was confirmed on cross-examination of Otto on rebuttal (Tr., pp. 363-364), and Otto additionally admitted that the soil samples had been taken and the tests run prior to his conversations with Shepard (Tr., p. 364).

From the foregoing, it is defendants' belief that Otto and Haas entered into the option to purchase agreement

with the defendants Shepard upon the strength of their own investigation of the property and not upon the basis of any representations made to them by Elmer Shepard.

8. *His right to rely thereon.*

In view of the factual situation in the case, did the plaintiff corporation through Otto and/or Haas have a right to rely upon the alleged statements of Shepard? The Arizona Supreme Court, in the case of *Springer v. Bank of Douglas,* 313 P. 2d 399, ... Ariz. ....., decided June 25th, 1957, says:

> "If he has an equal opportunity to form and exercise a judgment of his own, it is presumed that he relied upon his own judgment. 23 Am. Jur., Fraud & Deceit, §§164-165. *Sorrells v. Clifford,* 23 Ariz. 448, 204 P. 1013."

The court additionally cites the Arizona rule that a case of fraud cannot be based upon expressions of opinions, and in this respect, the Court is referred to the leading Arizona case of *Law v. Sidney,* 47 Ariz. 1, 53 P. 2d 64. In regard to the opportunity of the plaintiff to rely upon the defendant's alleged representations, the Supreme Court, in the foregoing case of *Law v. Sidney,* says:

> "Where parties deal at arm's length and are on equal terms, one who has failed to avail himself of knowledge readily within his reach cannot claim any right to rely upon representations which he could have discovered to be false by the use of such knowledge. *Dianconi v. Smith,* 3 Ariz. 320, 28 P. 880, 26 C.J., p. 1150 and note."

From the foregoing recitation of facts and the citations of the Arizona law applicable, defendants contend that plaintiff could not and did not have the right to rely upon any statements made by the defendant Elmer Shepard.

9. *His consequent and proximate injury.*

Defendants have maintained throughout the trial of the matter in the District Court and on this appeal that the only damage to plaintiff, if any, would be the difference between the value of the property if the defendants' representations had been true and the actual value of the property as it was when plaintiff received it. Defendants have heretofore cited to the Court the Arizona rule in this regard in Specification of Error No. 25, and will treat with the matter at length in Argument under paragraph number VII.

VII. Where One Has an Equal Opportunity to Make an Independent Investigation of Real Property for Purchase, It is Presumed He Relies on His Own Investigation Rather than Representations Made to Him by the Seller, and the Purchaser Cannot Say He Has Been Deceived to His Injury. (Specifications of Error Nos. 1, 2, 3, 4, 6, 7, 8, 9, 10, 20, 21 and 29.)

The foregoing proposition has been adopted both by the Supreme Court of the United States and the Supreme Court of the State of Arizona. In *Shappiro v. Goldberg,* 192 U.S. 232, 24 Sup. Ct. 259, 48 L.Ed. 419-425, the following language is employed by Mr. Justice Day, who delivered the opinion of the court:

> " . . . When the means of knowledge are open and at hand or furnished to the purchaser or his agent and no effort is made to prevent the party from using them, and especially where the purchaser undertakes examination for himself, he will not be heard to say that he has been deceived to his injury by the misrepresentations of the vendor."

In *Farrar v. Churchill,* 135 U.S. 609, 10 Sup. Ct. 771, 34 L.Ed. 246, a written memorandum was delivered to the real estate agent by the owner and exhibited to the prospective purchaser. The complainant, although insisting that he relied upon such memorandum, did visit the property and had an opportunity to examine it. The court dismissed his claim for relief, saying:

> " . . . If the purchaser investigates for himself and nothing is done to prevent his investigation from being as full as he chooses, he cannot say that he relied upon the vendor's representations."

An examination of the record will reveal that the plaintiff's alleged agents, Otto and Haas, did make an investigation of their own and both of these witnesses admitted they were not prevented from making a thorough inspection of the property. In this regard, the Court is referred to the statements of Mr. Otto (Tr., pp. 152-153) and Mr. Haas (Tr. pp. 277-278). The Arizona citations are to the same effect, and the Court is referred to *Springer v. The Bank of Douglas,* 313 P. 2d 399, ... Ariz. ....., *Wilson v. Byrd,* 288 P. 2d 1079, 79 Ariz. 302, and *Law v. Sidney,* 47 Ariz. 1, 53 P. 2d 64.

VIII. The Measure of Damages Sustained by a Purchaser Where a Purchase of Land Has been Induced by Fraud, Is, Under the Arizona Rule, the Difference Between the Real Value of the Property Purchased and the Value It Was Represented to Have. (Specifications of Error Nos. 11, 12, 15, 16, 17, 18, 22 and 25.)

The foregoing proposition has been repeatedly cited as the law by the Arizona Supreme Court in the following cases:

Wooley v. Locarnini, 18 Ariz. 539, 164 P. 319;
Curry v. Windsor, 22 Ariz. 108, 194 P. 958;
Ren v. Jones, 38 Ariz. 476, 1 P. 2d 110;
Hidalgo v. McCauley, 50 Ariz. 178, 70 P. 2d 443;
Lutfy v. R. D. Roper & Sons, 57 Ariz. 495, 115 P. 2d 161.

In the *Lutfy* case cited above, the court stated that a proper element for consideration in arriving at the damages suffered, and a necessary element, was the value of the property the plaintiff purchased, and that failure to produce that value and to prove it in court was error. This is precisely the position of the defendants in the instant case. It is defendants' contention that there was no evidence as to the purported or represented value of the land sold, nor was their any evidence of the value that the land had upon the day when the contract was consummated. The only testimony as to damages was the amount of the cost of the new well (Tr., p. 107) and an estimate as to the loss of the cotton crop (Tr., p. 362 & 118). Under the Arizona Supreme Court's decisions, the cost of drilling a new well was not, in fact, a proper element to be considered in de-

termining damages, nor was an estimate as to the loss of cotton.

The proper rule for loss to a growing crop is the difference between the value of the probable yield when ready for market and the expense of producing, harvesting and marketing the crop. *Gilliland v. Rodriguez,* 268 P. 2d 334, 77 Ariz. 163. Plaintiff failed completely to make such a showing in the trial below. This rule is not to be followed in fraud cases, but is cited only to show the Court that the determination of crop damage in the sum of $12,500.00 by the District Court [Minute Entry of November 23rd, 1956 (Order for Judgment)] was error under any theory.

In addition, defendants contend that plaintiff failed to prove that it was necessary to drill a new well, and the Court is referred to the testimony of the plaintiff's own witness Gordon Cameron, in this regard (Tr., pp. 211, 224, 225 & 226).

The defendants, in the course of the trial, cited to the court the correct rule for the measure of damages (Tr., p. 218); however, the court refused to consider the measure of damages as pointed out by defendants, and when defendants attempted to establish the value of the property, the court made the following ruling (Tr., pp. 217-218):

> "Knowing what you know about the well at the time Mr. Otto purchased it, would you say that was a fair price . . .
>
> "MR. REHNQUIST: We object to that. Under the Arizona Rule for Damages in Fraud, the estimate of the value of what you are receiving is utterly irrelevant.
>
> "THE COURT: Yes, I think so. I agree."

. . . .

"Q. Can you give us your opinion of the value of the property when Mr. Otto purchased it, in the condition it was?

"MR. REHNQUIST: Object again on the same grounds.

"THE COURT: Same ruling.

"MR. BURCH: If the Court please, I do believe the measure of damages is the difference between the actual value of the property received and the representations of the property value.

"THE COURT: All right, the Court ruled.

"MR. BURCH: That is all."

Defendants contend that both counsel for plaintiff and the court were put on notice as to the correct measure of damages rule, as set forth by the Supreme Court of Arizona, and that despite this notice to both court and counsel, the court persisted in error.

Defendants point out the District Court's Minute Entry of November 23rd, 1956 [Order for Judgment] (Tr., p. 28), which reads as follows:

"It is Ordered that judgment will be entered for the plaintiff in the sum of $35,106.40. Of this amount $22,606.40 is the cost of a new well and the balance, $12,500.00, is for crop damages."

The court obviously ignored the Arizona rule on the measure of damages in arriving at its judgment and attempted to award damages on the "out-of-pocket" rule for damages, which the Arizona Supreme Court has specifically declared not to be the rule. *Lutfy v. R. D. Roper & Sons,* cited above.

IX. The Federal Court is Bound to Follow the Controlling Rules of Substantive Law as Declared by State Legislatures or the Highest State Courts in All Cases Based on Diversity of Citizenship Jurisdiction, Unless a Federal Constitutional or Statutory Question is Involved. (Specifications of Error Nos. 15, 16, 17, 18 and 24.)

Since the overruling of the doctrine of *Swift v. Tyson,* (1842), 16 Pet. (U.S.) 1, 10 L.Ed. 865, in the case of *Erie R. Co. v. Tompkins,* 1938, 304 U.S. 64, 82 L.Ed. 1188, 58 Sup. Ct. 817, 114 A.L.R. 1487, the Federal courts must follow the state courts in regard to the measure of damages applied, fraud, parties plaintiff, and sufficiency of evidence. The United States Court of Appeals for the Ninth Circuit has followed this rule in the case of *New York Life Insurance Co. v. Rogers,* 126 F. 2d 784 (C.C.A. Ariz.). Defendants submit that the District Court failed to follow the proper measure of damages, as well as other particulars heretofore set out in this brief.

CONCLUSION

Appellants most respectfully reiterate that the District Court was bound to follow the rule set forth by the Arizona Supreme Court on such questions of substantive law as parties, fraud, burden of proof, and measure of damages. Appellants contend that the District Court failed in each of these categories to follow the controlling rules set forth by the Arizona Supreme Court in the cases heretofore cited. Plaintiff below failed to prove itself a proper party to the action, failed to sustain the burden of proof, and failed to show damages under the Arizona rule.

It is believed, therefore, that the judgment here upon appeal should be reversed with appropriate directions.

Respectfully submitted,

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